

***United States Court of Appeals
for the Second Circuit***

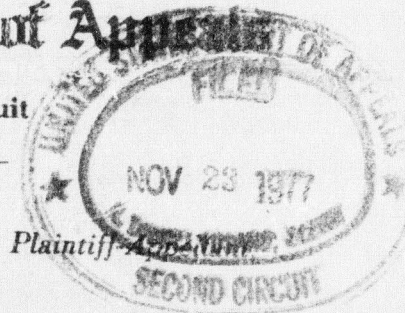


APPELLEE'S BRIEF

77-6132

In The
United States Court of Appeals
For the Second Circuit

ELEANOR TIMMONS,



Plaintiff

vs.

JOSEPH P. CALIFANO, Secretary of Health, Education and
Welfare,

Defendant-Appellee.

Appeal From The United States District Court
For The Western District of New York

BRIEF FOR APPELLEE

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Defendant-Appellee.

Appeal From The United States District Court
For The Western District of New York

BRIEF FOR APPELLEE

Statement of Issue Presented

The only issue to be determined by the court is whether the Secretary's decision that appellant was not under a disability is supported by substantial evidence.

Statement of the Case

Appellant brought this action pursuant to Section 205(g) of the Social Security Act, as amended (42 U.S.C. Section 405(g)), to obtain judicial review of a final decision of the Secretary of Health, Education and Welfare, denying her claim for disability insurance benefits.

Appellant filed an application for a period of disability and for disability insurance benefits on September 24, 1973 (A 72-75), alleging that she became unable to work in December 1969. The application was denied initially (A 76-77), and on reconsideration (A 78) by the Bureau of Disability Insurance of the Social Security Administration, after the New York State Agency, upon evaluation of the evidence by a physician and a disability examiner, had found that appellant was not under a disability (A 79-81). The Administrative Law Judge, before whom appellant appeared, considered the case *de novo*, and on October 6, 1975 found that appellant was not under a disability (A 17-29). The Administrative Law Judge's decision became the final decision of the Secretary of Health, Education and Welfare, when the Appeals Council approved that decision on March 1, 1976 (A 42-43).

Appellant Timmons then brought this action in the United States District Court, Western District of New York, alleging that the Secretary's decision was not supported by substantial evidence. On June 30, 1977 the Honorable Harold P. Burke decided cross-motions for summary judgment, finding the Secretary's decision supported by substantial evidence (A 191-193). Appellant Timmons is here appealing that District Court decision.

Statement of Facts

Appellant, who was born July 3, 1914, alleged inability to work since December 15, 1969 due to a nervous condition and internal problems (A 72). She completed tenth grade in school (A 24). Appellant has worked as a clerk and receptionist, at her last job she was a receptionist for an optician (A 62).

The medical evidence of record may be summarized as follows:

On January 31, 1956 appellant was seen by an unknown physician¹ for treatment of upper abdominal pains and difficulty in breathing since she began taking a certain medication (A 173). Thorazine, 25 mg was prescribed.

On February 18, 1956, appellant was again seen, this time for earaches, weakness and imbalance (A 173). Medication was prescribed.

On March 6, 1956, Dr. Daniel B. Schuster, M.D. reported the results of examinations of appellant on February 25 and March 2 (A 174). He noted that she had a long history of pain since her marriage eighteen years before but that the pain was atypical and not responsive to medication. Dr. Schuster commented that the symptoms were those of strongly masochistic personalities and probably would not change.

On January 14, 1957, Dr. William Jackson, M.D. performed a cytological examination of the cervix (A 125). Cervicitis was found, with no malignant cells present. Appellant was examined on the same date by Dr. George P. Heckel (A 167-171). Appellant complained of severe low back and rectal pain, especially before menstruation. An examination of the pelvis, vagina cervix and uterus was normal. The diagnosis was

¹Many of these medical records are hand written and unsigned, thus sections are illegible. The physician seems to be Dr. James William Quinlan, M.D. (A 105).

premenstrual syndrome. Progynon B. and Pecol tablets were prescribed.

On January 18, 1957, appellant complained to Dr. Heckel of muscle tightness and soreness (A 173). On January 21, Dr. Heckel gave her an injection of adrenalin and Ephedrine (A 166). On January 29, she was given Pregnandiol, although she reported feeling better (A 166). On January 30, 1957 appellant reported that the pain in her chest, epigastrium and back had gone (A 166). Pregnandiol was prescribed. On February 2, appellant reported pain, medication was increased (A 166). On February 6, muscle tightening increased and Folbesyn was prescribed (A 166).

On March 1, 1957, appellant came to Dr. James William Quinlan's office (A 105) with her husband (A 163). Appellant complained of back and pelvic pain. She also reported pain in her left shoulder which radiated to her breast and down her arm. Appellant said the pain was a side effect of Progynon B. The dosage of Pregnandiol was lowered. On March 18, appellant reported she felt better and Pregnandiol was given (A 163). On March 19, appellant reported that the pain in her left breast and shoulders had increased, while back and pelvic pain had decreased (A 163). Priol was prescribed.

On March 20, 1957, Dr. Heckel reported to appellant's employer that he was unable to determine when she could return to work (A 164).

On April 3, 1957, appellant complained of pain three days before menstruation. Priol was prescribed. On April 16, Dr. Heckel told appellant she could return to work, but she said she was unable to rush (A 164). On April 22, May 23, June 25 and June 30, 1957 Pregnandiol was given (A 169). On August 10, 1957, appellant was found to be pregnant and medication was given for nausea (A 162). That pregnancy resulted in a miscarriage.

On January 9, 1959, appellant was seen by Dr. Quinlan, (A 162). Dr. Quinlan commented that appellant was depressed with a loss of interest in everything. He prescribed Adrenalin and skin-tested her with metabolites subcutaneously. On January 10, appellant reported feeling better (A 162). Dr. Quinlan noted that appellant had a definite reaction to pregnandiol and prescribed adrenalin, Priol and Breone. On January 13, A.P.L. 500 units was given on January 17, 1959 the physician commented that appellant looked much better (A 162). Priol and Adrenalin were given. From January 20 to January 30, appellant reported feeling better and the treatment was continued (A 157). On January 30, the doctor reported that appellant was depressed and in the same condition she was in previously (A 157). Adrenaline, estrone, priol and pregnandiol were given.

On February 4, Ritalin was given (A 157). On February 10, Biphethamine was given (A 157). On February 18, appellant reported an intolerance to biphethamine and preone and priol were resumed (A 156). On February 25, appellant's own serum was prescribed along with adrenalin to relieve depression (A 156). On February 27, appellant reported that after injections of her own serum she felt depressed and had pains in her ovaries (A 156). On February 28, appellant reported to the doctor depressed and nauseated. (A 156).

On March 2, 1959, there was a reaction to her own serum and that treatment was stopped (A 156). On March 5, she was given another dose of her serum with no reaction (A 156). She did complain of tenderness above the umbilicus, burning in the epigastrium and pelvic discomfort. Adrenalin was given. On March 9, 1959, she complained of severe pain in her chest, neck glands, throat and back of her head (A 155-156). On March 10, she complained of feeling worse with an inflamed chest, throat, neck, ears, tongue, glands and head (A 155). The doctor recommended discontinuance of the injections of her own

serum. Codeine was prescribed. On March 13, adrenalin was given (A 155). On March 21, she was given her own serum plus A.P.L. (A 155). Serum was now to be injected alternate days. On March 22, 1959, appellant was seen by Dr. Myrtle Pleune (A 154). After meeting with Dr. Peune she felt better but later became depressed. She complained of severe pain because of the medication. The doctor recommended she stop taking medication. On March 25 she was given adrenalin (A 155). On March 27, she reported that she had felt much better after stopping medications (A 154). Then depression started again and she resumed taking medications. On March 25, 1959, she was given adrenalin (A 155). On March 28, she was given adrenalin and preone (A 155). On March 29 and March 30 the same treatment was given (A 154).

On April 15, 1959, Dr. Pleune reported that appellant's post partum depression was related to her sister's delivery of a healthy baby boy (A 153). Dr. Pleune said she had made some progress with appellant.

On April 28, 1959, appellant said that taking preone caused pain in her chest and muscles of her arm (A 154). If she stops taking it, she said she feels panicked. She was given adrenalin and priol.

On May 12, 1959 the doctor reported that preone seemed to cause pain but controlled the depression (A 154). On May 23, 1959 she became depressed and adrenalin and estradiol was given (A 151).

On June 4, 1959, appellant reported that several injections of medication made her feel shakey (A 151). She said that she had felt well until the thirtieth (of May) when she became depressed and suffered pain. She was given adrenalin and estradiol. On June 9, 1959, she was given adrenalin and progynon (A 151). On June 24, she reported that the depression had cleared though she experienced pelvic pain and pain in her right thigh (A 151).

An examination of the pelvis, vagina and uterus was normal. Several cysts and some ectropion was found upon examination of the cervix. Breasts were tender upon examination. The treatment was to hyfrecate the cervix and adrenalin. On June 29, 1959, she called to complain of severe pain in the right heel radiating upwards into the groin, across the lower back and down into the left knee (A 150).

On July 7, 1959, appellant complained of severe depression. Adrenalin was given (A 150). On July 8, the depression continued (A 150). On July 23, 1959, appellant complained of pelvic, throat, and chest pain, accompanied by depression (A 150). She was given adrenalin and her own serum, diluted. On July 29, she called in ill and depressed (A 150). On July 31, she called in somewhat better. Adrenalin was prescribed.

On August 4, 1959, appellant called in depressed with muscle pains in her head, back, neck, shoulders and chest (A 147). On August 5, she reported the depression had lifted in the evening but returned in the morning (A 147). Progynon and adrenalin were given. On August 7, 1959, she reported little, if any, relief from medication (A 147). Adrenalin and progynon B were given. On August 12, preone and adrenalin were given (A 147). On August 14, she reported severe depression (A 147). Medication was given on August 19, appellant reported being very depressed and agitated. (A 147). Adrenalin and nardil were given. Later that day, she was told to discontinue nardil (A 146). On August 24, adrenalin and nardil were given to relieve depression (A 143). On August 25, she reported severe depression and nervousness caused by nardil. (A 146). She was given adrenalin and her own serum. On August 27, she reported a headache but no depression (A 146). Appellant was given adrenalin and pregnanelone.

On September 8, 1959 Dr. Francis W. Kelly, M.D., reported to Dr. Heckel his examination of appellant (A 145). He

diagnosed anxiety psychoneurosis with reactive depression somewhat related to the loss of a baby in 1958. He recommended psychotherapy.

On September 19, 1959, appellant was given adrenalin for her depression (A 146).

On October 6, 1959, adrenalin was given (A 143). On October 14, adrenalin and pregnanelone were given (A 143). On October 16, appellant reported pain in her chest and epigastrium after injection (A 143).

On April 3, 1961, appellant was seen by Dr. Keckel (A 143). She reported feeling better but some nervousness post-menstrually. Examination revealed normal throat, nose, glands, thyroid, breasts, heart, lungs, abdomen, pelvis, vagina, cervix and uterus. In the rectum there was prolapse of the rectal mucosa.

On July 5, 1961, appellant reported an inability to take priol because it produced headaches and pains in her jaws (A 144). Priolone was given.

On June 5, 1963, Dr. Anthony A. Talamas, M.D. examined appellant based on injuries sustained in an automobile accident (A 140-141). Appellant complained of pain in the neck, epigastrium and pelvis. She was given codeine and aspirin and told to put heat on her neck. Dr. Quinlan also examined appellant on that date (A 138). He found nervousness, menses one week early, tiredness, sighing, and weakness. Tofranil was prescribed.

On September 29, 1963, Dr. J. William Quinlan reported on treatment of appellant for personal injuries sustained in an auto accident (A 136). The treatment was for headaches, blurred vision and back pains.²

²Most of this report by Dr. Quinlan is illegible.

On March 8, 1965, Dr. Quinlan gave appellant medication (A 135). He also had a test done at the cytology laboratory of St. Mary's Hospital in Rochester. An enlarged uterus was found. On June 8, 1965, Dr. Quinlan reported on an examination of appellant (A 134-135). Appellant complained of tiredness, cramps, coughing, pain in the abdomen, sleepiness, itching skin, gas and ankle swelling. Medication was prescribed.

On April 4, 1966, Dr. Quinlan saw appellant (A 137). She complained of depression, and pain in her fingers and knees. Medication was prescribed.

On April 1, 1967, Dr. William L. Madden, M.D. reported treatment of appellant since January, 1967 (A 131). Dr. Madden reported that he prescribed Premarin for appellant which resulted in side effects such as headaches and burning in her breasts. Next, Dr. Madden prescribed Delatestryl, which also produced side effects such as weakness. He was re-prescribing Premarin, a smaller dose, on a trial basis. Dr. Madden commented that the hormone deficiency was less significant than the underlying psychoneurotic pattern.

On April 5, 1967, Dr. Quinlan noted that appellant still suffered muscle aches tingling in her fingers, gas, and lower back pains (A 132; 137). Appellant also reported abdominal cramps, throbbing in her arms and weakness when the hormone was stopped. Appellant continually stated that these were side effects of the medication. Progesterone was prescribed.

On May 3, 1967, Dr. Quinlan reported to Dr. Madden that he had had little success in treating appellant because of the side effects she suffered from the medication (A 129-130). He reported that on examination no abnormalities were revealed. Dr. Quinlan prescribed a small amount of hormones in an attempt to relieve symptoms without side effects.

On January 5, 1968, Darvon compound was prescribed by Dr. Quinlan (A 132). On March 18, 1968, Darvon was again

prescribed (A 132). On July 2, 1968, Dr. Madden treated appellant with Premarin to alleviate an active yeast drainage (A 128). Dr. Madden also ordered Mycostatin suppositories. On September 10, appellant was again treated by Dr. Madden for a yeast infection (A 128).

On December 11, 1968, appellant was seen by Dr. Madden (A 132). Appellant complained of chest pain and diarrhea. Medication was prescribed.

From December 15, 1968 to December 22, 1968, appellant was treated as an in-patient at St. Mary's Hospital (A 123-125). Appellant's symptoms suggested influenza, but vomiting and difficulty in breathing appeared. X-rays revealed evidence of pneumonia. Her complaints of difficulty breathing were not verified by physical examination. Oxygen was given but appellant would not allow them to discontinue it. Rhonci and rales were present throughout the lungs. The diagnostic impression was basilar pneumonitis. Oxygen, Darvon and Thorazine were prescribed. Appellant was discharged in satisfactory condition. The final diagnosis was pneumococcyx pneumonitis.

Dr. J.T. Haggerty examined appellant on December 21, 1968, while she was still hospitalized (A 126). Dr. Haggerty found some clearing of the bilateral basilar infiltrations since December 15. There was more prominence of infiltrate in the area immediately adjacent to the left heart border. The pulmonary markings were somewhat stringy, indicating old disease. There was a slight increase in the AP diameter of the thorax and increased lucency in the retrocardiac and retrosternal space. The diagnostic impression was acute pneumonia involving the ligula and right middle lobe.

On January 3, 1969, appellant was examined by Dr. Quinlan (A 121). At that examination appellant complained of pain. Dr. Quinlan noted a severe emotional reaction. On January 10, medication was prescribed. (A 121). On February 7, appellant

complained of nausea burning pelvic pain, problems with the stools, coughing and vomiting (A 121).³

On January 19, 1970, Dr. Quinlan prescribed Meproamate for nausea (A 122).

On May 8, 1970, appellant was admitted to the Genesee Hospital for surgery by Dr. Dacks on internal and external hemorrhoids and rectal bleeding (A 96-101). An X-ray of the chest taken on that date was within normal limits. On May 17, appellant was discharged after an uneventful post-operative course. Medication was prescribed.

On October 21, 1970, appellant was seen by Dr. Quinlan (A 122). Appellant complained of rectal pain and gas. Dr. Quinlan found stretching of the rectum and prescribed medication. On October 30, 1970, Robinal and Plair was given (A 122).

On April 26, 1971, Dr. John H. Remington, M.D. examined appellant based on her complaint of fissures in the rectum and hard stools (A 109). A sigmoidoscopy was normal. Examination of the rectum revealed no fissures.

On September 4, 1973, appellant was treated at St. Mary's Hospital for a viral infection (A 120). On September 4, she complained of weakness, anxiety and abdominal cramps. On September 7, she was given Darvon for pain (A 120). On September 24, appellant complained of tiredness, pressure in the rectum caused by gas and pressure on her bladder (A 120). On that date, Dr. Quinlan reported that appellant was unable to work because of her physical condition (A 102).

On October 12, 1973, appellant was seen by Dr. John H. Remington, M.D. (A 118, 109). Appellant complained of fissures from dilation by Dr. Dacks which had not healed and difficulty evacuating. A sigmoidoscopy of the lower bowel

³On February 19, 1969, appellant was examined by Dr. Quinlan (A 138). That report is illegible.

revealed a normal intact mucosa. Examination of the lower rectum and anus failed to reveal any hemorrhoids or fissure. Barium clysma studies done by Dr. Guest were negative. Some rectocele was present. Dialose Plus was prescribed.

On February 11, 1974 Mellaril was prescribed (A 119). On August 15, 1974, appellant was examined by Dr. Robert Brodows, M.D., (A 106) an endocrinologist (A 115). Appellant complained of constipation, dry skin and puffiness of the face and extremities because of Premarin. Dr. Brodows noted that appellant's past history was essentially remarkable for multiple psychosomatic complaints. The physical examination revealed a palpable goiter and delayed reflexes with the rest of the examination being unremarkable. Dr. Brodows found hypoglycemia and a suggestion of myxedema (thyroid disorder).

On August 29, 1974, Dr. Brodows again examined appellant (A 115). Dr. Brodows found no pathological cause for appellant's complaints although her LH and rSH levels were high considering her estrogen intake. Premarin and Meproamate dosages were increased.

On October 3, appellant complained to Dr. Brodows of severe depression, insomnia, morning headaches, crying spells and tiredness (A 115). Dr. Brodows prescribed Elavil and discontinued estrogen. On October 9, 1974, Dr. Brodows commented that the hypoglycemia and multiple psychogenic complaints probably precluded appellant from working. He noted that with therapy she would be able to work within six months time.

On January 31, 1975, Dr. Stephen Dvorin, M.D., determined appellant unable to work because of multiple somatic complaints of a functional nature (A 107). Dr. Dvorin had treated appellant since November 9, 1974 for severe neurotic depression. Dr. Dvorin commented that the present period of appellant's illness began in 1971 (A 182-183), but concluded

that appellant was disabled from 1968 to 1970, though unsure of whether this was partial or total disability.

The non-medical evidence of record may be summarized as follows:

In her application, appellant said that she stopped working December 15, 1969 due to a nervous condition and internal problems (A 72). She testified that she was unable to cope with the pressure of her job (A 63). Appellant testified that she suffered from weak spells during which she felt dizzy and light headed, weak rectal muscles, pain in her rectum and hypoglycemia (A 66). She also testified that her medication caused side effects such as insomnia (A 65-66).

According to her earning certificate in the record, appellant met the earnings requirement for purposes of Social Security disability benefits through September 30, 1970 (A 82).

ARGUMENT

The decision of the Secretary that appellant was not under a disability is supported by substantial evidence and is therefore entitled to affirmance.

In order to establish entitlement to a period of disability and disability insurance benefits appellant has the burden of establishing that she was unable to engage in substantial gainful activity by reason of a physical or mental impairment, which can be expected to result in death or which has lasted or can be expected to last for a continuous period of at least 12 months and the existence of which is demonstrated by evidence supported by data obtained by medically acceptable clinical and laboratory techniques, at a time when she met the insured status requirements of the Act. 42 U.S.C. §423(d). *Franklin v. Secretary of Health, Education, and Welfare*, 393 F.2d 640 (2d

Cir. 1968); *Pickens v. Weinberger*, CCH Unemp. Ins. Rep. ¶17,609 (S.D.N.Y. April 29, 1974).

The mere presence of a disease or impairment is not disabling within the meaning of the Social Security Act. It must be shown that the disease or impairment causes functional limitations which preclude appellant from engaging in any substantial gainful activity. *Gotsnaw v. Ribicoff*, 307 F.2d 840 (4th Cir. 1962), cert. denied, 372 U.S. 945 (1963). *Mann v. Richardson*, 323 F.Supp. 175 (S.D.N.Y. 1971).

When making a finding as to appellant's disability or inability to engage in any substantial gainful activity, there are four elements of proof to be considered. They are: (1) objective medical facts and clinical findings; (2) diagnoses and medical opinions of examining physicians; (3) subjective evidence of pain and disability as testified to by appellant and corroborated by others who have observed her; and (4) appellant's age, educational background, and work history. All of these elements of proof must be considered together and in combination with each other. *Gold v. Secretary of Health, Education, and Welfare*, 463 F.2d 38 (2d Cir. 1972); *DePaepe v. Richardson*, 464 F.2d 92 (5th Cir. 1972); *Underwood v. Ribicoff*.

Section 205(g) of the Act, 42 U.S.C. §405(g), provides that the findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive. Accordingly, the Secretary's findings, if reasonable, should not be disturbed by the court on review. *Richardson v. Perales*, 402 U.S. 389 (1971); *Levine v. Gardner*, 360 F.2d 727 (2d Cir. 1966); *Wolf v. Secretary of Health, Education, and Welfare*, CCH Unemp. Ins. Rep. ¶14,202 (S.D.N.Y. March 10, 1975); *Sanders v. Weinberger*, CCH Unemp. Ins. Rep. ¶14,053 (E.D.N.Y. November 1, 1974); *Hofacker v. Weinberger*, 382 F.Supp. 572 (S.D.N.Y. 1974). The conclusive effect of the substantial

evidence rule applies not only with respect to the Secretary's findings as to basic evidentiary facts, but also to inferences and conclusions drawn therefrom. *Beane v. Richardson*, 457 F.2d 758 (9th Cir. 1972), *cert. denied*, 409 U.S. 859 (1972); *Vineyard v. Gardner*, 376 F.2d 1012 (8th Cir. 1967); *Rodriguez v. Celebrezze*, 349 F.2d 494 (1st Cir. 1965); *Sanders v. Weinberger*, *supra*; *Wolf v. Secretary of Health, Education, and Welfare*, *supra*.

Substantial evidence has been defined by the Supreme Court as "... more than a mere scintilla. It means such reasonable evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971), quoting from *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). Where there is only a slight preponderance of the evidence on one side or another, the Secretary's findings must be affirmed. *Wolf v. Secretary of Health, Education, and Welfare*, *supra*; *Sanders v. Secretary of Health, Education, and Welfare*, *supra*.

In the instant case, appellant alleged inability to work since December 15, 1969 due to a nervous condition and internal problems. At the hearing, she testified that she suffered from weak spells during which she felt light headed and dizzy, pain in her rectum, hypoglycemia, and weak rectal muscles. She testified that her medication caused side effects such as insomnia.

According to the medical evidence, appellant suffers premenstrual syndrome, reaction to medication, anxiety psychoneurosis with reactive depression and hypoglycemia. In application for a period of disability and disability insurance benefits, appellant bears the ultimate burden of persuasion to establish inability to engage in any substantial gainful activity and thus entitlement to disability benefits. It is settled law that appellant bears the ultimate burden of persuasion to establish

inability to engage in any substantial gainful activity and thus entitlement to disability benefits. *Gold v. Secretary of Health, Education, and Welfare*, 463 F.2d 38 (2d Cir. 1972); *Franklin v. Secretary of Health, Education, and Welfare*, 393 F.2d 640 (2d Cir. 1968); *Wolf v. Secretary of Health, Education, and Welfare*, CCH Unemp. Ins. Rep. ¶14,202 (S.D.N.Y. March 10, 1975).

Further, to be eligible for period of disability and disability insurance benefits, an applicant must fulfill the requirements of Section 223(c)(1) of the Act, 42 U.S.C.A. 423. Section 223(c)(1)(b) requires that an applicant have at least "twenty quarters of coverage during the forty quarter period which ends with the quarter in which such month occurred." This insured status is vital to the establishment of a period of disability. 20 C.F.R. §404.101. If the insured status is not met, there is no entitlement to disability benefits. In this case, appellant must prove she was disabled on or before September 30, 1970. Appellant must establish that she became "disabled" prior to the expiration of her insured status. It is well established that evidence of an impairment which reached disabling severity after the expiration of appellant's insured status, or exacerbation of an existing impairment after expiration, cannot be the basis for the determination of entitlement to a period of disability and disability insurance benefits, even though the impairment itself may have existed before appellant's insured status expired. *DeNafo v. Finch*, 436 F.2d 737 (3d Cir. 1971); *Henry v. Gardner*, 381 F.2d 191 (6th Cir. 1967), *cert. denied*, 389 U.S. 993 (1967), *rehearing denied*, 389 U.S. 1060 (1968); *Selig v. Richardson*, 379 F.Supp. 594 (E.D.N.Y. 1974); *Mann v. Richardson*, 323 F.Supp. 175 (S.D.N.Y. 1971).

In 1956, appellant was seen by Dr. Daniel B. Schuster and another physician for treatment of upper abdominal pains, difficulty in breathing, earaches, weakness and imbalance. Dr. Schuster noted that the symptoms were atypical and not

responsive to medication, commenting that the symptoms were those of a strongly masochistic personality. Appellant continued working throughout that year.

In 1957, appellant was examined by Dr. William Jackson, M.D. and cervicitis was found. She was examined by Dr. George P. Heckel, M.D., who diagnosed premenstrual syndrome. Progynon B and Pecol tablets were prescribed. Appellant is described as not working during the first four months of 1957, yet the earnings certificate shows earnings during all four quarters in 1957. In any event, for a condition to be disabling, it must have lasted or be expected to last for a continuous period of not less than one year.

In 1959 appellant was examined by Dr. Quinlan for depression and various aches and pains. Treatment included adrenalin, priol, preone, estrone, pregnondiol and biphethamine. Appellant was also examined by a Dr. Frances W. Kelly, M.D., who diagnosed appellant as suffering from anxiety psychoneurosis with reactive depression.

In 1961, appellant was examined by Dr. Heckel. He found some post-menstrual nervousness and prolapse of the rectal mucosa (falling of the upper part of the rectum into the lower part).

In 1963, appellant was examined by Dr. Anthony A. Talamas, M.D. for injuries sustained in an auto accident. Appellant complained of pain in the neck, epigastrium and pelvis. Codeine, aspirin and heat on the neck were prescribed. Dr. Quinlan prescribed Tofranil.

In 1965, appellant was examined twice by Dr. Quinlan. Appellant complained of tiredness, cramps, coughing, abdominal pain, sleeplessness, itching, gas and ankle swelling. Medication was prescribed.

In 1966, Dr. Quinlan treated appellant once for depression and pain in her fingers and knees.

In 1967, Dr. William Madden, M.D., treated appellant for hormone deficiency commenting that this deficiency was less significant than the underlying psycho-neurotic pattern. Dr. Quinlan also treated appellant in 1967 noting that treatment was difficult because of the side effects appellant experienced from the medication.

In 1968, appellant was treated by Dr. Quinlan for pain and by Dr. Madden for a yeast infection. In December 1968, appellant was hospitalized with pneumonia.

In 1969, appellant was treated by Dr. Quinlan. Appellant complained of severe pain, nausea, coughing and vomiting. Medication was prescribed.

In 1970, appellant was treated for nausea. In May, 1970, a hemorrhoidectomy was performed due to internal and external hemorrhoids and rectal bleeding. Appellant was discharged in satisfactory condition.

Although different physicians treated appellant from 1956 through 1970, and found different causes for appellant's ailments, it is significant that there is an absence of any medical evidence stating that appellant is unable to work. *Gerardi v. Secretary of Health, Education, and Welfare*, 408 F.2d 491 (9th Cir. 1969), *cert. denied*, 396 U.S. 856 (1969), *rehearing denied*, 397 U.S. 929 (1970); *Celebrezze v. Sutton*, 338 F.2d 417 (8th Cir. 1964); *Adams v. Fleming*, 276 F.2d 901 (2d Cir. 1960).

The only physician who concluded that appellant was disabled at any time during the period from 1956 to 1970, was Dr. Stephen Dvorkin, M.D., a psychiatrist, who based his conclusion on his examinations of appellant beginning November 9, 1974, four years after the earnings requirement was no longer met. In any event, the function of deciding

whether or not a person is under a disability belongs to the Secretary. A physician's conclusion on the issue of disability is not determinative of the ultimate fact of disability. 20 CFR 404.1526; *Good v. Weinberger*, 389 F.Supp. 350 (W.D. Pa. 1975); *Hofacker v. Weinberger*, 382 F.Supp. 572 (S.D.N.Y. 1974). Although such opinions are entitled to some weight, the amount of weight given will depend upon the degree to which the opinions are supported by clinical and diagnostic findings. 20 CFR 404.526; *Durham v. Gardner*, 392 F.2d 168 (4th Cir. 1968).

Appellant here alleged she suffered from various internal problems. It is noteworthy that the physicians could find no medically determinable cause for this pain, terming the allegations of pain "psychosomatic." While the Secretary recognizes that pain in and of itself can sometimes be disabling, the inability of an individual to work without some pain or discomfort does not in and of itself satisfy the test for disability under the Act. Appellant has the burden of proving that, in fact, her pain or discomfort is of such severity that it precludes her from engaging in any substantial gainful activity. *Gaultney v. Weinberger*, 505 F.2d 943 (5th Cir. 1974); *Candelaria v. Weinberger*, 389 F.Supp. 613 (E.D. Pa. 1975); *Pickens v. Weinberger*, CCH Unemp. Ins. Rep. ¶17, 609 (S.D.N.Y. April 29, 1974); *Caplin v. Finch*, 316 F.Supp. 17 (W.D. Pa. 1970).

Further, it is clear that the Secretary is not bound to accept as credible appellant's subjective testimony as to the existence or severity of her pain. *Deyo v. Weinberger*, 406 F.Supp. 968 (S.D.N.Y. 1975); *Good v. Weinberger*, 389 F.Supp. 350 (W.D. Pa. 1975). Indeed, as was succinctly set forth by the First Circuit in the *Reyes-Robles* case:

... if a claimant could, as a matter of law, overcome the effect of what would otherwise be substantial evidence of continued ability to work by her own

testimony as to her condition, the Secretary would rarely if ever be justified in denying benefits. 409 F.2d 84, 87, (1st Cir. 1969).

Appellant's allegations of pain are not persuasive in light of her continuous working throughout the period from 1956 to 1968. In this case, appellant's working during the alleged period of disability clearly demonstrates an ability to engage in substantial gainful activity, since the work she performed during the alleged period of disability is similar to the type of work she performed prior to that period. 20 CFR 404.1532, *Fuerst v. Secretary of Health, Education, and Welfare*, 354 F.Supp. 185 (S.D.N.Y. 1973); *Wolf v. Secretary of Health, Education, and Welfare*, CCH Unemp. Ins. Rep. ¶14,202 (S.D.N.Y. March 10, 1975).

Any remediable impairment is not disabling within the meaning of the Act. Hypoglycemia is remediable with special treatment. It is noteworthy that no such treatment was prescribed by Dr. Brodows. Appellant had a hemorrhoidectomy in May 1970, and was discharged in satisfactory condition. Thus, because the hemorrhoids were alleviated by surgery, no finding of disability can be based on that condition.

Appellant's complaints were of long standing nature, neither the treatment nor the complaint changed significantly before 1970. That plus appellant's working continuously until 1968 mitigates against any finding of disability.

On the basis of a thorough consideration of the evidence of record, the Secretary concluded that appellant had not established that she suffered from any seriously restricting impairment at any time when she met the insured status requirements of the Act. As appellant did not establish an inability to engage in an occupation in which she had previously worked, the Secretary was not obliged to elicit vocational

evidence bearing on the availability of alternative job opportunities. *Reyes Robles v. Finch*, *supra*; *Dupkunis v. Celebrezze*, 323 F.2d 380 (3d. Cir. 1963); *Lopez v. Secretary of Health, Education and Welfare*, CCH Unemp. Ins. Rep. ¶14,047 (D.P.R. November 6, 1974); *Mann v. Richardson*, 323 F.Supp. 175 (S.D.N.Y. 1971); *Crespo v. Secretary of Health, Education, and Welfare*, 303 F.Supp. 441 (D.P.R. 1969).

On the basis of a thorough evaluation of the evidence of record, the Secretary determined that appellant failed to sustain the burden of proof that she was under a disability within the meaning of the Act. It is submitted that the Secretary's determination is reasonable and should be affirmed by this court under the substantial evidence rule. 42 U.S.C. §405(g). *Richardson v. Perales*, *supra*; *Gonzalez v. Richardson*, *supra*; *Ginsburg v. Richardson*, *supra*; *Levine v. Gardner*, *supra*.

CONCLUSION

It is submitted that the Secretary's determination is supported by substantial evidence and is therefore entitled to affirmance.

Respectfully submitted,
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November 21, 1977

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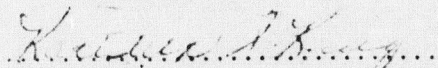
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